United Nations AT

Administrative Tribunal

Distr.
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AT/DEC/913
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 913

Case No. 991: MIDAYA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas, on 23 October 1996, Witty Golden Midaya, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 March 1997, the Applicant again filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1997 the time-limit for the filing of an application with the Tribunal;

Whereas, on 27 October 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"a. [To] rescind the decision to separate me from service.

b. [To] award me [a] one-year letter of appointment commencing on 1st February, 1994 to supersede the shorter term extensions of contract which I had been awarded, and [to] effect payment of all my salaries and allowances

to which I was entitled.

....

d. [To order that] UNHCR should institute a proper investigation in the allegations made against me and let me continue working rather than pass judgement before the proper investigations are carried out.

e. [To] compensate me for being mishandled by UNHCR Management.

...

h. [To] clear my name which has been gravely tarnished and compensate me for that.

i. [To] authorize payment of my terminal benefits after almost six years of dedicated service with UNHCR."

Whereas the Respondent filed his answer on 18 December 1998;

Whereas the Applicant filed written observations on 14 April 1999;

Whereas, on 28 June 1999, the Applicant submitted additional documents;

Whereas, on 7 July 1999, the Respondent filed objections to the Applicant's 28 June submission;

Whereas, on 22 July 1999, the Applicant submitted comments on the Respondent's 7 July submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 1 January 1989, on a three-month short-term appointment as Assistant Field Officer, in the National Officer category, at the NO (A)/II level, at the Regional/Branch Office for Malawi. His short-term appointment was successively extended until 1 July 1989, when he was granted a one-year fixed-term appointment. This appointment was extended successively until 31 January 1993, when the Applicant resigned his National Officer post in order to accept an international post. On

1 February 1993, he commenced a one-year intermediate-term appointment as Field Officer, at the L-2, step I level, at Mandera/Banissa, Kenya. On 1 August 1993, the Applicant was reassigned to Dadaab, Kenya. From 1 January to 9 July 1994, the Applicant was sent on mission to Kampala, Uganda. His appointment was extended several times until 16 July 1994, when the Applicant separated from service.

On 10 May 1994, five staff members including the Head of the Field Office, Pakelle, sent a petition to UNHCR Representative in Kampala, requesting him to "recommend to Headquarters a change of duty station of [the Applicant] since none of us are happy with the way he conducts his affairs."

In a cable dated 31 May 1994, the Deputy Representative, UNHCR, Kampala, recommended to the Personnel Administration Section (PAS), the extension of the Applicant's appointment until the end of September 1994. In a further cable dated 1 June 1994, the Deputy Representative asked PAS, to disregard the 31 May cable, and noted that a recommendation concerning the extension would follow an assessment of the staff member's performance.

On 13 June 1994, the Deputy Representative, UNHCR, Kampala, wrote to the Head of Desk II, Regional Bureau for Africa, UNHCR Headquarters, recommending that the Applicant's contract not be extended beyond its date of expiration. The Deputy Representative explained that following "a combined mission ... undertaken by the Administrative Officer and Programme Officer to Sub-Office Pakelle on 9 June 1994 for further assessment of Mr. Midaya's performance", consultations with staff demonstrated that:

"...

> [The] staff member is very poor in demonstrating initiative for his presence in the camps. His negotiation and managerial skills in handling the local authorities, NGO's and staff members in Field Office Kitgum and Sub-Office Pakelle at least to be [sic] called unsatisfactory. Moreover, we would like to emphasize that Mr. Midaya's personal relations with his colleagues are very weak and most of the times this creates many problems in the moral [sic] of the office.

..."

In an undated handwritten note in the Applicant's official status file, the Head of Desk II, Regional Bureau for Africa (RBA), noted that he supported the recommendation for non-extension of the contract.

On 15 June 1994, the Senior Personnel Officer, Division of Human Resources Management (DHRM), UNHCR, compiled a report concerning allegations of sexual misconduct leveled against the Applicant. The Personnel Officer wrote in the Executive Summary and Key Recommendation, inter alia:

> "...
>
> This report does not result from any formal investigation into the allegations made against [the Applicant]. ...
>
> Rather, the report is a catalogue of the allegation made against [the Applicant]: taken together, the variety of sources and locations from where these allegations have arisen, constitute a mass of circumstantial indications that the staff member has conducted himself in a manner which is incompatible with the standards expected of international civil servants, resulting in the recommendation that
>
> > *Mr. Midaya's present fixed term appointment therefore not be extended, and that he on the expiration of his present appointment be separated from service.*"

On 21 June 1994, the AVSI Camp Coordinator, Kitgum, forwarded a petition, signed by five AVSI staff members including himself, to the UNHCR Acting Representative, Branch Office, Kampala. The petition requested that the Applicant be transferred away from that duty station and accused the Applicant of rarely visiting the Acholpii Camp, of "not contribut[ing] in any way to the demanding job of looking after the Refugees," and of "creat[ing] confusion and misunderstanding [among] Authorities, refugees and [the AVSI staff]."

On 1 July 1994, the Applicant's appointment, due to expire on 30 June 1994, was extended for two weeks and two days until 16 July, so that the Applicant could finalize his separation formalities. On 6 July 1994, the Applicant was evacuated to Kampala, Uganda, for security reasons, and upon his arrival he was informed by the Representative, Deputy Representative and Administrative Officer, Kampala, that his contract would not be extended beyond 16 July 1994.

On 8 July 1994, the Applicant requested the Deputy Director, DHRM, UNHCR, to reconsider the decision not to extend his contract.

On 9 July 1994, the Applicant's mission to Uganda ended, and he returned to Nairobi, Kenya. On 15 July 1994, the Applicant requested the Director, DHRM, and the Director, RBA, Geneva, to give him reasons for the decision not to extend his contract and to consider him for service elsewhere in the Organization. On 16 July 1994, the Applicant separated from service.

On 21 July 1994, a Personnel Officer, UNHCR, Geneva, advised the Applicant that the Director, DHRM, had reconfirmed his original instruction to effect separation following the recommendation for non-extension of the Applicant's appointment.

On 29 July 1994, the Applicant wrote to the Chairman of the Staff Council, with a copy to the Director, DHRM, and to the Director, RBA, Geneva, requesting his intervention in the matter. On 29 August 1994, the Chairman of the Staff Council wrote to the Director, DHRM, claiming that the Applicant had not received due process in connection with the decision not to renew his contract and requesting, inter alia, that the Applicant be reinstated and that a proper investigation into the allegations against the Applicant be instituted.

On 2 September 1994, the Senior Personnel Officer responded to the letters received by DHRM from the Applicant, noting in part, as follows:

"...

On the question of your appointment to the L.2 level, you will recall that the reason for delay in issuing your letter of appointment was the fact that we had not received your written resignation from your previous National Officer post. You will also recall that you, at the time, were offered the option of either resigning from the National Officer category and being immediately appointed at the internationally recruited professional level, or of retaining a lien to your National Officer post and being granted a temporary special post allowance to the Professional category; in the event, you opted for the first option. The appointment to the L category rather than to the P category was - and remains - standard practice in such cases. For your information, the numerous written queries to which you make reference in paragraph 1 of your memorandum are not on file.

...

In your memorandum dated 8 July 1994 ... you make reference to conversations I held with you in Pakelle in April 1994 during which I informed you that I had been requested to look into the allegations of sexual harassment which had been made against you. ... I made additional enquiries into the matter, and my findings were later compiled in a confidential report, which I submitted to the Director of DHRM. I am enclosing in a sealed envelope a copy of this report, which, as you will note, concludes that DHRM should not - in view of the recommendation for non-extension of appointment received in the meantime - pursue the matter of possible disciplinary action against you based on the material available to us at that time.

However, the findings of my preliminary report were that there appeared to be sufficient circumstantial indications to support the conclusion that you had not conducted yourself in a manner expected of international civil servants, and that you, in spite of several warnings from a number of supervisors in at least two countries, had apparently failed to heed the advice offered to you to conduct your professional and personal affairs in an appropriate manner, and finally that your conduct had reflected unfavourably on UNHCR in three different countries [for] almost as many years.

..."

On 3 January 1995, the Applicant responded to the Senior Personnel Officer, denying the allegations of sexual misconduct contained in the confidential report.

Also on 3 January 1995, the Applicant requested the Secretary-General to review the decision not to extend his contract. Having received no substantive response to his request for review, the Applicant lodged an undated appeal, received by the Joint Appeals Board (JAB) Secretariat on 24 March 1995.

The JAB adopted its report on 20 August 1996. Its findings, conclusion and recommendation read as follows:

> "30. The Panel examined the receivability of the appeal under staff rule 111.2 (a) and (f). The Panel noted that the Appellant was notified of the administrative decision not to renew his contract on 6 July 1994 and that he wrote to the Secretary-General on 3 January 1995, i.e. six months after he had been notified of the decision.
>
> 31. In the light of the JAB file, the Panel examined the appeal to determine whether there were exceptional circumstances that might justify a waiver of the time-limits, as provided for under staff rule 111.2 (f), but was unable to find any. Indeed, the Panel could not accept that writing to the Deputy Director, DHRM, and to the Chairman of the Staff Council precluded the Appellant from requesting the administrative review of the contested decision in due time. The Panel also noted that the Appellant was already in contact with the Chairman of the Staff Council in late July and in August 1994. Therefore the Panel considers the appeal as time-barred.
>
> **Conclusion and recommendation**
>
> 32. The Panel concluded that the appeal was time barred and that there were no exceptional circumstances which could justify a waiver of the time-limits, in compliance with staff rule 111.2 (a) and (f).
>
> 33. Consequently, the Panel makes no recommendation in support of this appeal."

On 19 September 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report and has taken note of the conclusions of the Panel that your appeal was time-barred and that there were no exceptional circumstances which could justify a waiver of the time-limits. He has also noted that the Panel made no recommendation in support of your appeal, and, accordingly, the Secretary-General has decided to take no further action in respect of your case.

..."

On 27 October 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's contract should be rescinded because it was based on fabricated allegations that UNHCR never properly investigated and on a report that the Applicant did not have the opportunity to rebut.

2. The Applicant had a legitimate expectation that his contract would be renewed.

3. The Applicant should be paid termination benefits because he had only resigned from his National Officer post on the basis of the representation that he would receive a P-2 appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant's appointment, made under the 200 Series of the Staff Rules, carried no expectancy of renewal. UNHCR has not, by its behaviour, created a legal expectancy of renewal. Efficient or even outstanding behavior does not create a legal expectancy of renewal.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

3. Termination indemnity is only payable to staff whose appointments have been terminated. The Applicant is not entitled to such indemnity because his appointment simply expired.

The Tribunal, having deliberated from 29 June to 23 July 1999, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision dated 19 September 1996, accepting the recommendation of the JAB that the Respondent find that the appeal was time-barred and that no exceptional circumstances had been established which justified a waiver of the time limits. The Applicant claims that his application is receivable and that the non-renewal of his fixed-term appointment was a violation of his rights. He requests the Tribunal to award him a one-year appointment, to compensate him for damages arising from the mishandling of his case by UNHCR, and to grant him a termination indemnity after almost six years of service.

II. First, the Tribunal must determine whether the appeal was time-barred. Staff rule 111.2 provides, inter alia:

> "(a) A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.
>
> ...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

III. On 1 July 1994, the Deputy Director, DHRM, informed the Branch Office, Malawi, that the Applicant's appointment would not be extended beyond 16 July 1994. On 6 July 1994, the Representative, Deputy Representative and Administrative Officer, Kampala, orally informed the Applicant that his contract would not be renewed. On 8 July 1994, the Applicant requested the Deputy Director, DHRM, to reconsider the non-extension of his contract. That letter establishes beyond argument that the Applicant was aware of the decision not to renew his fixed-term appointment. In accordance with the provisions set forth in staff rule 111.2 (a) any request by the Applicant for the Secretary-General to review the decision not to extend his appointment should have been made by 8 September 1994. The Applicant did not request review of the decision until 3 January 1995. Even if the Tribunal were to accept, as the final administrative decision against which he was appealing, the letter of 2 September 1994 from the Senior Personnel Officer, DHRM, confirming to the Applicant that the date of his separation from service was 15 July 1994, the Applicant's request for review would still be two months late. The Tribunal has consistently, in its decisions, emphasized the importance of complying with the mandatory time-limits set out in the Staff Rules. (Cf. Judgements No. 527, Han (1991); No. 549, Renninger (1992); No. 596, Douville (1993); and No. 796, Xu et al. (1996)).

IV. The Applicant claims that "exceptional circumstances" apply in his case, justifying a waiver of the time limits under staff rule 111.2(f). He submits that the absence of replies from the Director and Deputy Director, DHRM, and the absence of advice from the Chairman of the Staff Council concerning his case constitute "exceptional circumstances". The Tribunal finds that the JAB properly rejected this

claim. The Tribunal has consistently held that "exceptional circumstances" justifying waiver of the time limits must consist of events beyond the Applicant's control that prevent the Applicant from timely pursuing his or her appeal (cf. Judgements No. 372, Kayigamba (1986); and No. 713, Piquilloud (1995)). Therefore, the Tribunal holds that the appeal was time-barred.

V. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/914
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 914

Case No. 1022: GORDON
PELANNE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Joan Gordon, a staff member of the United Nations, and Pierre Pelanne, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 10 June 1998, the Applicants filed an application requesting the Tribunal:

"...

7. ... to determine that:

...

(ii) The amount of compensation granted to the Applicants was grossly disproportionate with the gravity and seriousness of the irregularities committed in [the Department of Administration and Management] in disregard of its responsibility for 'establishing administrative policies, procedures and machinery for the efficient and effective functioning of the internal justice system' in the Organization.

(iii) The amount of compensation was also inadequate in view of the far-reaching consequences of the irregularities committed by the Respondent; irregularities which cannot be corrected otherwise.

...

8. [and to order] the Respondent to grant them compensation and damages equivalent to **three years net base salary, in addition to the two months** which the Respondent has agreed to pay them on the recommendation of the Joint Appeals Board ..."

Whereas the Respondent filed his answer on 10 February 1999;

Whereas the Applicants filed written observations on 31 March 1999;

Whereas the facts in the case are as follows:

The Applicant Gordon entered the service of the United Nations on 12 January 1976, on a one-year fixed-term contract as Alternate Secretary, Joint Appeals Board (JAB) and Joint Disciplinary Committee, at the P-3 level. Her appointment was successively extended until 1 June 1979, when she received a probationary appointment. On 1 February 1980, the Applicant Gordon received a permanent appointment; on 1 February 1982, she was promoted to the post of Secretary, JAB, at the P-4 level; and she was promoted to the P-5 level with effect from 1 April 1987. On 1 October 1990, she became the Chief of Administrative Review Unit, Office of Human Resources Management (OHRM), Department of Administration and Management.

The Applicant Pelanne entered the service of the United Nations on 1 February 1970, on a probationary appointment, as an Associate Programme Management Officer at the P-2 level, in the Department of Economic and Social Affairs, Office of Technical Cooperation. On 1 February 1972, his appointment was converted to permanent. On 1 April 1973, the Applicant Pelanne was promoted to the P-3 level. On 4 September 1974, he transferred to the post of Administrative Officer, Training Service, Division of Personnel. He was promoted to

the P-4 and P-5 levels on 1 April 1976 and 1 April 1981, respectively. On 1 May 1982, he became Deputy Chief of the Training and Examinations Service, Division of Personnel Administration, and his functional title changed to Chief of Section on 7 December 1987. On 31 March 1999, the Applicant separated from service upon retirement.

In a memorandum dated 5 March 1996, entitled "Implementation of General Assembly resolutions on the programme budget for the biennium 1996-1997; and Actions required by the Efficiency Board", the Assistant Secretary-General for Human Resources Management, proposed to the Under-Secretary-General for Administration and Management, inter alia, "a revised organizational structure for OHRM."

On 6 March 1996, the Chief of Staff, Executive Office of the Secretary-General, informed the Chairperson, Appointment and Promotion Board, inter alia, as follows:

> "As part of additional restructuring within OHRM to respond to the need for better implementation of the Secretary-General's human resources management strategy and to reflect functional changes and efficiency needs which are required for implementation of the 1996/7 budget, and with the full agreement of the Assistant Secretary-General for Human Resources Management, the Secretary-General has decided to appoint the following staff at the D-1 level:
>
> > [Ms. X] as Deputy Director, Staff Development and Performance, Policy and Specialist Services Division and Chief, Training and Career Management Service;
> >
> > [Ms. Y] as Chief, Common System and Organizational Policies and Litigation Service;
> >
> > ...
>
> I would be grateful if these appointments could be brought to the attention of the members of the Appointment and Promotion Board."

In a memorandum dated 22 March 1996, the Assistant Secretary-General for Human Resources Management announced to all Heads of Departments and Offices, inter alia, that

with effect from 25 March 1996, Ms. X had been appointed Deputy Director of the Specialist Services Division and Chief, Staff Development Services, and that Ms. Y had been appointed to the post of Chief, Common System and Specialist Services.

On 20 May and 21 May 1996, respectively, the Applicants requested the Secretary-General to review the administrative decision to assign two staff members, one at the P-5 level, and one at the D-1 level from outside the Department, to the only two D-1 level posts in the Specialist Services Division without first circulating vacancy announcements for them. Not having received a reply within the applicable time limits, the Applicant Pelanne lodged an appeal with the JAB on 17 July 1996, and the Applicant Gordon lodged an appeal with the JAB on 19 July 1996.

The JAB adopted its report on 16 October 1997. Its considerations and recommendation read as follows:

> "69. The Panel first considered the question of the circulation of vacancy announcements for the above mentioned D-1 posts. In that respect, the Panel observed that in a number of resolutions the General Assembly had directed that the Administration should announce 'all existing vacancies' (resolution 33/143, para. I, para.1(a)), and further required that 'Vacancy announcements for all posts shall be issued without delay as soon as vacancies are known' (resolution 35/210, Annex, para. 12). ...
>
> 70. The Panel observed that the Representative of the Secretary-General contended that the two D-1 posts had to be filled on an urgent basis to meet the exigencies of the service resulting from the recent restructuring, and that 'OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these two vacancies'. In that respect, the Panel noted that the Administrative Tribunal had expressed the view, in its Judgement No. 362, Williamson, that a waiver of the vacancy announcement 'might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation.' The Panel did not consider that the decision to proceed with the restructuring referred to in the reply of the Representative of the Secretary-General to the appeals created 'an extraordinary emergency situation' within the meaning of the above mentioned judgement, and therefore justified the non-distribution of vacancy announcements as mandated by ST/AI/390.

71. The Panel then observed that the Appellants had complained that they had not been fully and fairly considered for either D-1 position. It further observed that the Representative of the Secretary-General had contended that the ASG/OHRM was familiar with the qualifications, merit and experience of all his senior staff at the P-5 level and above and that 'having considered all P-5 candidates in OHRM, [the ASG had concluded that] none possessed the wide experience and skills obtained by [the preferred candidates] in a number of varied assignments.' In other words, the Representative of the Secretary-General, while recognizing that 'the procedures set out in ST/AI/390 ... had not been followed', implied that the Appellants had been duly and fully considered for the posts referred to above. In that respect, the Panel noted that, in its Judgement No. 362, Williamson, the Administrative Tribunal had stated, inter alia:

> 'If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honored in good faith in that the Administration gave the "fullest regard" to it,'

and had ruled, in its Judgement No. 447, Abbas, that the burden of proof of having given consideration was on the Respondent whenever a staff member questioned that such consideration had been given.

72. In the present cases, the Panel found that except for the assertion that the ASG/OHRM was familiar with the qualifications, merit and experience of all his senior staff at the P-5 level and above and had considered all P-5 candidates in OHRM, there was no evidence of any merit that the Appellants had been properly considered. The Panel was 'not given any indication how, where, when and by whom' the Appellants' claims for those particular posts were examined and with what consequence, as specified by the Administrative Tribunal in its Judgement No. 447, Abbas. In the circumstances, doubts persisted that the Appellants had been accorded due process and that, in any event, the required degree of consideration had been given to them.

73. The Panel considered, however, that even if the Appellants had been given full consideration, nothing indicated that [either] of them would have automatically been selected for one of the posts. It was therefore difficult for the Panel to entertain any claim on that account.

...

Recommendation

75. The Panel unanimously recommends that because of that failure the ... Appellants are entitled to compensation. It unanimously agrees to recommend that the amount of compensation for each of those Appellants should be equal to two months' base salary at the time the two posts mentioned in [the Assistant Secretary-General for Human Resources Management's] memorandum of 22 March 1996 had been filled. ..."

On 30 January 1998, the Under-Secretary-General for Management transmitted to the Applicants a copy of the JAB report and informed them as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the findings of the Panel that the non-distribution of the vacancy announcements for the posts in issue was not justified by the circumstances and that you did not receive the required degree of consideration for these posts. He has also noted the Panel's statement that, even if you had been given full consideration, nothing indicated that you would have automatically been selected for one of the posts.

The Secretary-General acknowledges the irregularities which occurred in the filling of the posts in issue and has taken note of the Panel's view that compensation should be awarded. He has decided to accept the unanimous recommendation of the Panel regarding compensation and, accordingly, has decided that you receive compensation in the amount of two months' net base salary, calculated as of 25 March 1996, the date the two posts in issue were filled."

On 10 June 1998, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contention is:

Although the Respondent has admitted that irregularities occurred in the filling of the posts at issue, he has failed to compensate the Applicants sufficiently, in the light of the seriousness, extent and consequences of those irregularities.

Whereas the Respondent's principal contentions are:

1. The need to fill the two D-1 positions in question on an urgent basis was necessitated by the exigencies of service.

2. The failure to advertise those posts did not prejudice the Applicants' chances for promotion.

3. The Applicants have been adequately compensated for procedural irregularities which occurred in the filling of the posts in issue.

The Tribunal, having deliberated from 1 to 23 July 1999, now pronounces the following judgement:

I. The Applicants Gordon and Pelanne have filed a joint application. Because the two Applicants set forth the same pleas and raise identical issues, namely the filling of two D-1 posts without first circulating vacancy announcements for these posts, the Tribunal orders joinder of the cases.

II. The Applicants maintain that the failure to circulate vacancy announcements "violated their right to be considered fairly and objectively for the posts". They assert that the decision violated the relevant provisions of the Secretary-General's Bulletin ST/SGB/267 of 15 November 1993 and the administrative instruction ST/AI/390, also of 15 November 1993, on Placements and Promotion. The Applicants also point out the irony of the Assistant Secretary-General for Human Resources Management writing in a memorandum dated 21 August 1995, to the Director, Field Administration and Logistics Division, that "Missions are required to ensure the existence of suitable procedures to conduct their internal promotion review in a fair and objective manner", while at the same time committing irregularities in filling the two D-1 posts at Headquarters, in his own department.

III. The Respondent concedes that "[o]f course, the procedures set out in ST/AI/390 on Placement and promotion were not followed ..." The Respondent argues, however, that the irregularities in the filling of the two D-1 posts were due to urgent exigencies of service and that the two posts had to be filled on an expedited basis. The Respondent contends that the procedures followed must be considered within the framework of reorganization of the Department. As the Respondent argues in his answer, "OHRM simply could not afford the unavoidable delay of 4 to 6 months that would have resulted from announcing these two vacancies and following the normal placement and promotion procedures".

IV. The JAB found that the urgency alleged by the Respondent was not of sufficient magnitude to overcome the need to issue a vacancy announcement, in the light of the standard set by the Administrative Tribunal in its Judgement No. 362, Williamson (1986). In Williamson, the Tribunal held that waiver of a vacancy announcement "might be justified in the light of the responsibilities of the Organization under the Charter in an extraordinary emergency situation, for example, a peacekeeping or natural disaster relief operation". The JAB concluded that the "urgent exigencies" allegedly confronting OHRM did not constitute "an extraordinary emergency situation" in accordance with the standard enunciated in Williamson.

V. According to the JAB's findings, the Respondent failed to demonstrate that the Applicants were "duly and fully considered" for promotion for the above-mentioned posts. As the Tribunal has held, the Respondent has the burden of proving that a staff member received consideration for a post or promotion. (Cf. Judgement No. 447, Abbas (1989)). The Tribunal is satisfied that, in the instant case, the Respondent has failed to demonstrate that either of the Applicants was properly considered. The JAB recommended that the Secretary-General pay the Applicants compensation in the amount of two months net base salary. The JAB limited the amount of compensation to that sum, explaining that "nothing indicated that

[either] of them would have automatically been selected for one of the posts."

VI. The Secretary-General accepted the JAB's recommendation and, in a letter to the Applicants, acknowledged the irregularities committed and offered them compensation of two months net base salary, as recommended by the JAB.

VII. The Tribunal agrees with the JAB that the urgency alleged by the Respondent to justify his actions was not so extraordinary in nature that the Administration could avoid the procedures that all staff members are entitled to expect. The Tribunal is satisfied that under the standard established in Williamson, no "extraordinary emergency situation" existed that might have justified the suspension of proper procedures for promotion. The Tribunal is of the view that the Assistant Secretary-General for Human Resources Management could have found other ways of coping with the reorganization of his Department, without having to breach the procedures guaranteeing due process for the Applicants. If, as the Respondent claims, the allegedly "urgent" circumstances could be considered an "extraordinary emergency situation", justifying a departure from the rules, such an excuse could be invoked so frequently that the rules would seldom be followed. Such a result would lead to a complete breakdown of the promotion system, would severely affect career development, and would lead to wholesale favouritism. Consequently, staff morale would suffer, to say the least.

VIII. In light of the serious breach of procedure, the Tribunal finds the amount of compensation recommended by the JAB and accepted by the Respondent to be inadequate. Although the damage suffered by the Applicants is difficult to assess in monetary terms, clearly the Applicants should have been awarded more than two months net base salary for such a flagrant disregard of their rights by the very authority charged with protecting them. The JAB's reason for limiting its recommendation for compensation, that "nothing indicated that [the Applicants] would have automatically been selected for one of the posts" had they

been given full consideration, is unpersuasive. As a result of the improper procedure used by the Respondent, the Applicants were automatically excluded from any opportunity to compete for the posts. The Respondent's disregard of proper procedures was detrimental to the Applicants' career development, and caused the frustation and mental anguish of not being considered for posts for which they might have been qualified. Moreover, the Tribunal cannot take lightly the violation of due process by the Respondent, particularly when ST/AI/390 (superseded in 1996 by ST/AI/413), was enacted by him in order to prevent the very practices to which he resorted in this case. The Tribunal finds that in light of the extraordinary circumstances described above, the Applicants are entitled to a larger amount of compensation than was recommended by the JAB and accepted by the Respondent.

IX. The Tribunal feels compelled to add that this is such a serious case of maladministration that consideration should be given to invoking staff rule 112.3, which provides:

"Financial responsibility

> Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Thus, the Secretary-General may decide that the officials who violate staff regulations and administrative instructions should be held personally accountable for the monetary damages occasioned by such violations. (Cf. Judgements No. 358, Sherif, para. XIII (1995) and No. 887, Ludvigsen, para. VIII (1998)). Invoking staff rule 112.3 would deter staff from deliberately flouting the rules and prevent the Organization from having to pay for the intentional violation of the rules by its officials.

X. For the foregoing reasons, the Tribunal orders the Respondent:

(i) To pay the Applicant Gordon compensation in the amount of 18 months of her net base salary, at the rate in effect on the date of this judgement; and

(ii) To pay the Applicant Pelanne compensation in the amount of 18 months of his net base salary, at the rate in effect on the date of his separation from service.

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(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/915
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 915

Case No. 1008: GUGGENHEIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Thomas Guggenheim, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1997 and 31 March 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 27 February 1998, the Applicant filed an application requesting the Tribunal, inter alia:

"(a) *To rescind* the decision of the Secretary-General endorsing the conclusion of the Joint Appeals Board not to make any recommendation in support of the Applicant's appeal;

(b) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in finding that the contested decision had not been implemented, that there was no evidence that the Applicant resigned under duress and for failing to provide appropriate and adequate compensation for the harm done to the Applicant for denial of due process and violation of his rights under the Staff Regulations and Rules;

(c) *To order* that the Applicant be reinstated with retroactive effect from 16 November 1994 and that he be paid full salary and benefits from that date to the present;

(d) *To award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the denial of due process suffered by the Applicant as well as for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case."

Whereas the Respondent filed his answer on 29 October 1998;

Whereas the Applicant filed written observations on 26 April 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Operation in Somalia (UNOSOM) on 21 September 1993, on a six-month fixed-term appointment, as a Building Management Service (BMS) Assistant at the FS-3 level. On 21 March 1994, his appointment with UNOSOM was extended through 30 November 1994. On 15 November 1994, the Applicant separated from service upon resignation.

On 15 July 1994, the Applicant requested that he be transferred from UNOSOM to the United Nations Assistance Mission in Rwanda (UNAMIR).

On 31 July 1994, a BMS Assistant (hereinafter "the complainant") wrote to the Director of Administration, UNOSOM, stating that on 30 July 1994, the Applicant, accompanied by four other staff members, went to the complainant's residence, forced himself inside the complainant's room, attacked the complainant verbally, forced the

complainant down on his bed, "grabbed and pulled [his] hair, twisted [his] arms, and proceeded to beat [him]."

On 8 August 1994, the Applicant was selected to serve on mission with UNAMIR for an initial six-month period.

Also on 8 August 1994, the Director of Administration informed the Officer-in-Charge (OIC), Security Coordination, that, with respect to the complaint against the Applicant, "[p]rior to any action taken by my office, it is vital that a meticulous investigation of the matter be carried out as the matter is viewed extremely seriously if proven" and requesting that the OIC, Security Coordination, begin inquiries and submit conclusions without delay. The Senior Investigator, Investigations Unit, took statements from the Applicant, the complainant, and seven witnesses. The Applicant, in an undated statement, explained that on the night of 30 July, he and other staff members were on their way to the Applicant's cabin after being at the BMS Social Club, and that, on the way, he told the others that he "wanted to go say goodbye to [the complainant]." He stated that when the complainant opened the door of his cabin, the Applicant went inside and, using expletives, criticized the complainant's work habits. The Applicant further claimed, inter alia: "I did not strike [the complainant]. I only prevented him from leaving my presence by holding his hand so that I could talk to him." In a statement dated 18 August 1994, the complainant corrected certain facts from his prior statement, stating that the Applicant "did not succeed in pushing me down on the bed", that he "did not hold my hair" and that he "did not beat me". The complainant did, however, reaffirm that the Applicant "held and twisted [his] right hand ... [and] also held [his] neck."

On 19 August 1994, the Senior Investigator, Investigation Unit, reported his conclusions to the OIC, Security Coordination, including that the Applicant "did assault [the complainant]", but that the complainant's "credibility was somewhat tarnished because 18 days later he found it suitable to change facts about the incident."

On 21 August 1994, the Applicant wrote to the complainant, apologizing for the events of 30 July 1994, and asking the complainant to "reconsider filing a complaint against [the Applicant] or any other BMS staff member." On 23 August 1994, the complainant requested the Director of Administration to disregard his statement of complaint, as he had "received apologies from all those involved including [the Applicant]".

On 26 August 1994, the Director of Administration, UNOSOM, transmitted the investigation report to the Acting Director, Field Operations Division (FOD), and Chief, Personnel Section, FOD, recommending that the Applicant "be warned about his behaviour prior to his proceeding on another assignment." He noted that "while it was established that [the complainant] was assaulted, the extent of the assault remains questionable."

On 31 August 1994, the Chief, Personnel Section, FOD, sent a cable to the Director of Administration, UNOSOM, stating, "We have reviewed report on investigation into complaint against [the Applicant] and consider incident serious on basis of which we wish [to] advise we [are] no longer pursuing [the Applicant's] reassignment to UNAMIR and further that his appointment will not be extended upon expiry end November 1994 ... "

On 20 September 1994, the Applicant requested the Secretary-General to review the decisions not to reassign him to UNAMIR and not to extend his appointment beyond 30 November 1994.

On 14 October 1994, the Applicant wrote to the Deputy Security Coordinator, Investigation Unit, noting that he had not been requested to respond to the findings of the investigation. After contesting a number of assertions in the investigation report, he concluded:

> "I have petitioned the UN to hear my case and reconsider the findings and the decision made by FOD to terminate my appointment ... I have denied ... that [the complainant] was assaulted by me. I will attempt to dispute the findings of the investigation report and have the punishment for my actions re-evaluated".

On 31 October 1994, the Applicant tendered his resignation, effective 15 November 1994, stating that "Due to exigencies at my home in the United States, I must leave UNOSOM earlier than the expiration of my contract, 30 November 1994."

On 1 November 1994, the Applicant sent another memorandum of resignation in which he stated inter alia:

> "My motivation to work for this mission and its mandate has been irrevocably destroyed by the unfair and unjust actions taken by this administration and by FOD/NY subsequent to the complaint filed against me on 31 July 1994. The decisions made ... regarding the events of 30 July 1994 have been based on allegations that could not be substantiated; nor could they be proven. In my opinion, these decisions were made arbitrarily. I cannot, in good conscience, continue with UNOSOM without giving the mission my best effort."

On 17 February 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 25 November 1996. Its considerations, conclusion and recommendation read as follows:

"Considerations

...

29. The Panel considered that by failing to inform the Appellant of the impending decision [not to extend his appointment] and to invite him to submit any written statement or explanation he might wish to make in this matter before a final decision was made about the extension of his appointment, the Administration had deprived him [of] the benefit of due process. Consequently, when final, the decision was vitiated by procedural error and would, under normal circumstances, have to be rescinded on the basis of Administrative Tribunal Judgement No. 252 (Noble).

30. The Panel, however, noted that the above-mentioned decision had not been implemented, as the Appellant had resigned before the expiry date of current appointment and that therefore it had not affected his rights. The Panel also considered the question of whether or not the Appellant's decision to resign had been made under duress, but it could not find any evidence to that effect in the material before it.

Conclusion and Recommendation

31. The Panel unanimously concludes

(a) That the contested decision had not been implemented, as it had been rendered moot by the Appellant's resignation;

(b) That the Appellant's decision to resign had not been made under duress.

32. The Panel unanimously decides to make no recommendation in support of the appeal."

On 20 January 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. The Secretary-General has taken note of the Board's unanimous conclusions (a) that the contested decision had not been implemented, as it had been rendered moot by your resignation, and (b) that your decision to resign had not been made under duress. The Secretary-General has also taken note of the Board's unanimous determination to make no recommendation in support of your appeal and has decided to accept this recommendation and to take no further action in respect of your case."

On 27 February 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy that his contract would be renewed.

2. The Respondent's decision not to renew the Applicant's contract was improper because the serious charges against the Applicant were not referred to a disciplinary body and thus the Applicant was never given a meaningful opportunity to rebut the accusations against him.

3. The Applicant resigned due to the stress caused by the Respondent's actions against him and therefore such resignation did not render his claims moot.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims are moot because the decision not to extend his fixed-term appointment was not implemented as a result of his resignation from service prior to the expiry of his appointment.

2. The Applicant has not produced evidence that his resignation was made under duress.

The Tribunal, having deliberated from 29 June to 23 July 1999, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 20 January 1997, accepting a unanimous JAB recommendation that the Respondent find that the decision contested by the Applicant had been "rendered moot by the Applicant's resignation" and that the Applicant's "decision to resign had not been made under duress". In his application, the Applicant argues that the decision of the Respondent not to renew the fixed-term appointment was unlawful and improper. He seeks retroactive reinstatement or, in the alternative, compensation in the amount of three years net base salary as well as damages and compensation due to a denial of due process.

II. The issue in this case is whether the decision not to renew the Applicant's fixed-term appointment violated his rights. The Applicant claims that this decision was improperly based on allegations that he assaulted another staff member, who subsequently withdrew his charges, and that he was not given any opportunity to rebut the allegations because no proper

disciplinary proceedings were ever instituted against him. He claims, therefore, that he was denied due process .

The Tribunal is of the view that the Respondent's failure to inform the Applicant of his right under staff rule 110.4 (a) to avail himself of the assistance of another staff member in his defence and to respond to the allegations deprived the Applicant of due process. (Cf. Judgement No. 576, Makwali (1992)). The Tribunal finds that claims by a staff member, especially involving denial of due process, are not necessarily extinguished by the subsequent resignation or change of status of the staff member (cf. Judgement No. 742, Manson (1995)).

III. As correctly stated by the JAB, the decision not to renew the Applicant's contract was never implemented because the Applicant resigned before the expiration date of his appointment. The Applicant argues that such resignation was made under duress. The Tribunal has long held that staff members have the burden of proving duress (cf. Judgements No. 719, Kartsev (1995); No. 811, Hallett (1997); and No. 910, Soares (1998)). The Tribunal is unable to find any evidence in the record that would substantiate the Applicant's claims of duress or coercion on the part of the Respondent that caused the Applicant to resign. Moreover, the Applicant's letter of resignation does not refer to coercion or duress. The Applicant only stated that "due to exigencies at [his] home in the United States" he would have to leave his post early.

IV. However, the Applicant's resignation prior to the expiry of his contract did not absolve the Organization from making decisions in accordance with proper procedures, which have been established to ensure fairness and impartiality. The Tribunal notes that the Applicant, during the time of his employment, requested an administrative review of this decision not to renew his contract and sought legal advice from a member of the Panel of Counsel, who informed him that his resignation would not affect his appeal.

V. In light of the Tribunal's findings that the Applicant was not afforded an opportunity to rebut the allegations made against him, the Tribunal holds that the Respondent failed to follow proper procedures. For this failure, the Applicant is entitled to compensation, which the Tribunal assesses at two months of his net base salary, at the rate in effect on the date of his separation from service.

VI. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To pay the Applicant compensation in the amount of two months of his net base salary, at the rate in effect on the date of the Applicant's separation from service.

(b) Rejects the remainder of the Applicant's pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/916
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 916

Case No. 997: DOUAJI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 7 January 1998, Mary Elias Douaji, a former staff member of the United Nations, filed an application requesting the Tribunal:

"[To order:]

i. Reinstatement of Applicant to a post commensurate with her qualifications.

ii. [Consideration of] the period between 29 April 1993 and the date of her reinstatement as special leave with full pay.

iii. [Compensation to the] Applicant for the injury caused to her through the UN Secretary [sic] breach of commitment.

iv. Payment of counselling fees and secretarial works estimated at US$ 700."

Whereas the Respondent filed his answer on 31 August 1998;

Whereas the Applicant filed written observations on 10 March 1999;

Whereas the Applicant filed additional written observations on 20 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Disengagement Observer Force (UNDOF) in Damascus on 7 September 1981 on a one-month fixed-term contract, as a Clerk-Typist at the G-3 level. Her appointment was extended successively and, on 1 June 1984, was converted to a temporary indefinite appointment. She was promoted to the G-4 level, as Secretary, on 1 October 1987. On 31 August 1992, she separated from service pursuant to an agreed termination following the abolition of her post.

This matter arises out of relocating UNDOF headquarters. At a date not specified in the files, it was decided to abolish 33 out of 123 posts in Damascus, including that of the Applicant. A clerical post established in UNDOF outside of Damascus was offered to the Applicant, but she declined to be relocated out of Damascus. On 22 June 1992, the Applicant sought to accept the post previously offered to her. However, on 26 June 1992, the Applicant was advised that this post had already been filled. On 13 July 1992, the Applicant was employed on an interim basis with the Headquarters Personnel Section, pending the complete relocation of Headquarters out of Damascus. On 31 August 1992, the Applicant was separated from service for abolition of post and was paid a termination indemnity.

On 9 July 1992, the Applicant requested review of the decision to separate her from service. In the absence of a reply to her request for review, on 6 October 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 April 1993. Its considerations and recommendation read, in part, as follows:

"Considerations

...

10. The Panel noted that Appellant had been offered another post in UNDOF, but had initially refused it. The Panel felt that the offer of the post fulfilled any obligation the Secretary-General had to her. Moreover, it did not find evidence that there was any element of prejudice in the decision to separate her.

Recommendation

11. Although the Panel concluded that Appellant did not have a legal claim on the Organization, in the light of UNAT Judgement # 290 (...), the Panel recommends that her name be retained by UNDOF Administration and she be given priority consideration for appointment to any future vacant post for which she is qualified."

On 29 April 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and accepted its recommendation. He has directed, accordingly, that your name be retained on the roster of candidates for employment by UNDOF Administration and that you be given priority consideration for appointment to any future vacant post for which you are qualified."

On 24 August 1993, the Applicant wrote to the Under-Secretary-General for Administration and Management, stating that the Secretary-General's decision of 29 April 1993 was not being implemented since she had not been re-employed by UNDOF despite existing vacancies and alleging that "they don't want to employ me saying that the Chief of the particular section where the vacancy is, does not like me (without knowing me personally)."

On 9 November 1993, the Principal Officer, Office of the Under-Secretary-General for Administration and Management, forwarded the Applicant's 24 August letter to the Chief, Field Personnel Section, Field Operations Division. In response, on 14 December 1993, the Chief Administrative Officer (CAO), UNDOF, advised as follows:

"...

2. In accordance with the Secretary-General's decision and instruction of 29 April 1993 that the name of [the Applicant] 'be retained on the roster of candidates for employment by UNDOF Administration and that [she] be given priority consideration for appointment to any future vacant post for which [she] is qualified', UNDOF has been consistently following the above instruction.

3. Please note that since the receipt of above instruction (June 1993), UNDOF has in fact employed only three clerical staff, one Procurement Clerk on fixed-term appointment and the other two, a Procurement Clerk and a Clerk-Typist for the General Services Section, on Special Service Agreement (SSA) ...

4. In the recruitment process, [the Applicant's] name was always among the candidates for the above-mentioned clerical positions. The Chiefs of Sections concerned were consistently requested to interview and as necessary test the candidates for the respective positions with due consideration given to the case of [the Applicant]. Since the Section Chiefs concerned are well familiar with [the Applicant], they did not find it necessary to call her in for the interview. On the basis of her personal qualities, as compared to the other candidates for the positions, [the Applicant] regrettably was considered to be less qualified.

5. In the light of the above, we wisl. to confirm that UNDOF will continue to retain [the Applicant's] name in the roster of candidates and that she would be given priority consideration to any future vacant post for which she may be considered most qualified. It is of course understood that she would be evaluated together with other candidates."

On 1 July 1996, the Applicant's counsel wrote to the Force Commander, UNDOF, alleging that the Secretary-General's direction that the Applicant be given priority consideration for employment had not been followed and further alleging that 30 vacancies for which she was qualified had been filled since June 1993.

On 15 August 1996, the Applicant's counsel wrote to the Secretary-General alleging that notwithstanding 30 suitable vacancies, the Applicant had not been re-employed by UNDOF.

On 27 August 1996, the CAO, UNDOF, advised the Applicant's counsel of the serious financial situation of the Organization and of the Secretary-General's decision to freeze recruitment with effect from September 1995. However, he assured the Applicant's counsel that "should the situation change and the employment of a locally recruited Secretary would be necessary, [the Applicant] will be given priority consideration."

On 17 September 1996, the Chief, Personnel Management and Support Service, Field Administration and Logistics Division (FALD), Department of Peace-keeping Operations (DPKO), forwarded the Applicant's counsel 15 August letter to the CAO, UNDOF, Damascus, and requested clarification concerning the issues raised in that letter. On 22 October 1996, the CAO, UNDOF, clarified that 14 vacancies were filled through local recruitment during the prior three years and that 12 of these posts were at the Applicant's G-4 level. He further noted that the Applicant "was considered together with other candidates for those positions for which she was considered qualified."

On 19 December 1996, the Applicant, through her counsel, requested the Secretary-General to ensure that his decision of 29 April 1993 be implemented as soon as possible. On 28 January 1997, a Human Resources Officer, Office of Human Resources Management (OHRM), replied, reassuring the Applicant that UNDOF would continue to retain the Applicant's name on UNDOF roster for priority consideration for any vacancies for which she is qualified, and pointing out that "only limited recruitment of local staff [had] taken place in UNDOF during the last three years". On 3 February 1997, the Chief, Personnel Management and Support Service, FALD, DPKO, requested the CAO, UNDOF, to ensure that the Applicant's name be retained on the roster of candidates "for consideration for vacancies for which she meets the required qualifications."

On 10 February 1997, the Applicant's counsel wrote to the Human Resources Officer, OHRM, requesting that the Applicant be re-employed as soon as possible. On 17 March 1997, the Applicant's counsel wrote to the CAO, UNDOF, asking what steps had been taken to reinstate the Applicant and noting that numerous other staff members with qualifications equal to those of the Applicant had been appointed since 1993.

On 22 April 1997, the Applicant lodged an appeal with the JAB, requesting the JAB to recommend, inter alia, the Applicant's re-employment with UNDOF.

On 24 July 1997, the Presiding Officer, JAB, informed the Applicant as follows:

> "...
>
> In your letter [of 22 April 1997], you referred to the failure on the part of UNDOF Administration to implement the Secretary-General's instructions as stated in his decision ... [that the Applicant] be 'given priority consideration for appointment to any future vacant post for which [she is] qualified' as the basis of this appeal.
>
> The above instruction cannot however be considered as an administrative decision under Chapter 11 of the Staff Rules. Consequently, I regret to inform you that your statement could not be received as an appeal."

On 2 August 1997, the Applicant's counsel wrote to the Presiding Officer, JAB, stating that the appeal against "the non-extension of priority for re-employment" was in line with Chapter XI of the Staff Rules. On 3 October 1997, the Secretary of the JAB confirmed that the case would not be considered by the JAB since it did "not meet the requirements for an appeal".

On 19 November 1997, the Applicant wrote to the Secretary of the JAB and, citing Judgement No. 821, Akkawi, requested that the case be filed with the JAB.

On 7 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to adhere to his own decision to give the Applicant priority consideration for appointment to vacant posts for which she is qualified.

2. The appeal was receivable before the JAB, and is receivable before the Tribunal.

3. Exceptional circumstances warrant a waiver of the time limits.

Whereas the Respondent's principal contentions are:

1. The application is not receivable before the Tribunal, as the requirements of article 7 of the Statute of the Administrative Tribunal are not fulfilled.

2. Should the Tribunal nevertheless decide to receive this application, the Respondent submits that the Applicant was fully considered in accordance with the terms of the Secretary-General's decision of 29 April 1993.

The Tribunal, having deliberated from 6 to 23 July 1999, now pronounces the following judgement:

I. UNDOF employed the Applicant as a Secretary in Damascus. In 1992, UNDOF headquarters was moved out of Damascus. The Applicant's post was abolished but the Applicant was offered a post at the new location. Initially, she refused the offer due to family reasons. When she later expressed interest in accepting the post, she was informed that it had already been filled. She was terminated with effect from 31 August 1992, and paid a termination indemnity. The Applicant filed an appeal with the JAB against the decision to separate her from service. The JAB concluded that the Applicant "did not have a legal claim on the Organization", but recommended that "her name be retained by UNDOF Administration and [that] she be given priority consideration for appointment to any future vacant post for which she is qualified."

The Secretary-General accepted the JAB's recommendation and informed her on 29 April 1993 that he had "directed ... that your name be retained on the roster of candidates for employment by UNDOF Administration and that you be given priority consideration for appointment to any future vacant post for which you are qualified."

The Respondent contends that the Applicant's name was retained on UNDOF's roster of candidates for suitable vacancies and that she was being given "priority consideration" for appointment to posts for which she was qualified.

III. On 15 August 1996, the Applicant's counsel requested the Secretary-General to take action to implement the Secretary-General's decision of 29 April 1993. On 27 August 1996, the CAO, UNDOF, informed the Applicant that due to a hiring freeze, she could not be given priority consideration at that time. On 19 December 1996, the Applicant's counsel again wrote to the Secretary-General, requesting that he take action to implement the decision of 29 April 1993. On 28 January 1997, the Human Resources Officer, Operational Services Division, OHRM, responded on behalf of the Secretary-General, noting that only limited recruitment of staff [had] taken place in UNDOF during the last three years and that [the Applicant's] name [had] been considered together with other candidates for those posts for which she appeared qualified." On 10 February 1997, the Applicant's counsel responded, stating that "a ban on recruitment should not have been a barrier to the specific instructions of the Secretary-General", and requested that the Applicant be reinstated as soon as possible. On 17 March 1997, the Applicant's counsel again wrote to the CAO, UNDOF, listing 17 staff members who had been recruited since the Secretary-General's decision of 29 April 1993, and alleging that the Applicant was equally qualified.

On 22 April 1997, the Applicant lodged an appeal with the JAB, seeking implementation of the Secretary-General's decision of 29 April 1993 to give the Applicant priority consideration for appointment to a future vacant post. No JAB was ever convened. Rather, on 24 July 1997, the Presiding Officer of the JAB wrote to the Applicant, stating that the Secretary-General's decision of 29 April 1993 "cannot ... be considered as an administrative decision under Chapter 11 of the Staff Rules" and that therefore "[the Applicant's] statement could not be received as an appeal." The Applicant, on 2 August 1997, responded by clarifying that the decision contested was the "non-extension of priority

for re-employment and/or reinstatement ..." On 3 October 1997, the Secretary of the JAB reiterated to the Applicant the Presiding Officer's position that the appeal was not receivable by the JAB.

IV. The Applicant thereafter filed the present application with the Tribunal. She seeks reinstatement to a post commensurate with her qualifications, and asks that the period between 29 April 1993 and the date of her reinstatement be treated as special leave with full pay. In addition, she requests compensation for injuries arising from the Secretary-General's alleged breach of his commitment.

V. The Tribunal must first determine whether the Applicant's case is receivable. Article 7(1) of the Statute of the Tribunal states that:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

VI. The Respondent submits that the application is not receivable because (1) the Secretary-General's decision of 29 April 1993 could not be considered an administrative decision under Chapter XI of the Staff Rules; (2) the Applicant's appeal to the JAB could not be considered as she, at no time, requested administrative review as a first step in the appeals process in accordance with staff rule 111.2 (a); (3) the Secretary-General did not communicate his final decision to the Applicant in this matter according to staff rule 111.2 (p); and (4) the Secretary-General has not agreed to submit the application directly to the Tribunal.

The Respondent's argument appears to be based on the incorrect premise that the Applicant was appealing against the Secretary-General's decision of 29 April 1993, by which

he had accepted the JAB's recommendation to retain the Applicant's name on a roster of candidates for employment and to give her priority consideration for future vacant posts for which she was qualified. It is clear that the Applicant is satisfied with that decision and seeks only to have it implemented. The "administrative decision" that she sought to challenge, first by writing to the Secretary-General and later by appealing to the JAB, was the Secretary-General's failure to take appropriate measures to implement his decision of 29 April 1993. The Tribunal notes that the Applicant tried, on more than one occasion, to request the Secretary-General to review the alleged failure to implement his decision. It appears that the Respondent did not reply to her final letter to the CAO, UNDOF, dated 17 March 1997, in which she alleged that numerous posts had been filled by individuals with qualifications similar to hers. Having received no reply to that 17 March letter, on 22 April 1997, the Applicant lodged an appeal with the JAB, against the Respondent's alleged failure, over the course of four years, to implement the 29 April 1993 decision.

The Presiding Officer of the JAB improperly rejected the Applicant's papers instituting an appeal. She, like the Respondent, incorrectly assumed that the decision that the Applicant was challenging was the 29 April 1993 decision, when in fact she was challenging the Administration's inaction in relation to the implementation of that decision. The JAB should have been convened to consider the Applicant's case and determine whether the Respondent was in fact properly implementing the 29 April 1993 decision. The JAB has considered similar cases in which a staff member has appealed the Secretary-General's failure to implement a prior promise to give the staff member "priority consideration" for a post or a promotion. (Cf. Judgements No. 444, Tortel (1989); No. 678, Lukas (1994); No. 706, Elahi (1995)).

VIII. The Tribunal finds that the Applicant was entitled to lodge an appeal with the JAB. Any other result would tie the hands of staff who wish to challenge the Administration's *failure* to implement decisions taken in their favour.

IX. In view of the foregoing, the Tribunal orders that:

(a) The case be remanded to the JAB for consideration on the merits;

(b) All other pleas are rejected.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Victor YENYI OLUNGU
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/917
30 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 917

Case No. 1018: ALI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Ruquaya Abdul Hamid Ali, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 17 April 1998, the Applicant filed an application requesting the Tribunal:

"[To find]

i. [T]hat compensation is paid for gross negligence on the part of Respondent, resulting from ignoring Applicant's health condition, and delaying termination of her services, which afflicted badly her health status.

ii. [T]hat interest be paid for amount due between the date of ignoring her health condition and the date [of] judgement.

iii. That secretarial and legal counseling fees estimated at 400 are paid."

Whereas the Respondent filed his answer on 17 August 1998;

Whereas the Applicant filed written observations on 10 December 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 21 September 1968, as a Teacher on a one-week Temporary Assistance Basis, at Falouja Girls School, Damascus area. She continued to receive further periodic appointments on a Temporary Assistance Basis in various schools through 27 October 1972, after which time she received an appointment for a fixed duration as Teacher, at the grade 4 level, at Yarmouk School, Damascus area. On 1 September 1973, she received a temporary indefinite appointment as an Area staff member in the capacity of Teacher "F" at Yarmouk School in the Syrian Arab Republic (SAR).

On 14 September 1991, the Senior Medical Officer, Yarmouk Health Centre, reported to the Area Officer, Damascus, that the Applicant had been medically examined and found unfit for duty. He recommended that she be referred to a Medical Board.

On 23 October 1991, a Medical Board examined the Applicant and concluded that she was suffering from neck pain due to mild degenerative disease in the cervical column but that she was fit for further service with the Agency. On 29 October 1991, the Field Health Officer concurred with that conclusion.

On 21 January 1992, the Senior Medical Officer, Yarmouk Health Centre, again reported to the Area Officer, Damascus, that the Applicant had been medically examined and found unfit for duty; he therefore recommended that she be referred to a medical board. On 15 March 1992, the Deputy Field Office Director signed Part I of the Medical Board Proceedings Form, requesting the Field Health Officer to convene a medical board to examine

and report on the Applicant.

On 30 June 1992, the Chairman of the Medical Board sent a memorandum to the Area Officer, Damascus, listing a number of teachers, including the Applicant, who were requested to confirm in writing whether their request to be examined by a medical board was still valid or otherwise. According to the Respondent, no such confirmation was received from the Applicant.

On 17 October 1994, the Deputy Chief, Field Health Programme, requested a physician at Yarmouk Health Centre to arrange for a medical examination of the Applicant to decide whether she should be examined by a medical board. On 9 November 1994, the Chief, Field Health Programme, reported to the Field Administration Officer that the health status of the teachers on the list attached to his memorandum, including the Applicant, had been reviewed and that they were recommended for examination by a medical board to decide their fitness for service.

On 29 December 1994, the Medical Board convened to examine the Applicant found that she was suffering from asthma, degenerative disease in her cervical column and multiple sclerosis, and that she was unable to continue her job as a teacher. The Board concluded that the Applicant was unfit for further service with the Agency.

On 14 February 1995, the Field Personnel Officer, SAR, informed the Applicant that the Medical Board found her to be unfit for further service with the Agency and that her services would be terminated for health reasons on 3 September 1995. Effective 3 September 1995, the Applicant's appointment was terminated on grounds of health, and she was paid her separation benefits, including a disability benefit, by cheque on 8 October 1995.

On 28 January 1996, the Applicant wrote to the Director of UNRWA Affairs, SAR, claiming that despite a specialist's report demonstrating that she was unfit for further duty, the Medical Board had found her fit for duty in 1992. Not until three years later, in 1995, and following the extreme deterioration of her health was she declared medically unfit for service by the Medical Board. Holding the Agency responsible for "ignoring [her] as a human being", she requested payment of the difference between the conversion of her separation

benefits into US dollars using the UN's operational rate of exchange available in January 1992 (SYP 11.20 to the US dollar) and the conversion of those benefits into US dollars at the rate of exchange in effect at the time she was declared unfit (SYP 26.60 to the US dollar). She also sought compensation for the alleged negligence of the Medical Board.

On 8 February 1996, the Field Administration Officer informed the Applicant that, because she had been separated from the Agency's service for health reasons three and a half years after the current exchange rate came into effect, her request could not be granted.

On 8 March 1996, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (JAB). The JAB adopted its report on 31 July 1997. Its findings, conclusion and recommendation read, in part, as follows:

"...

20. In its deliberations, the Board dwelt on the preliminary issue of receivability of the case and resolved that it is within its competence to entertain this appeal because the Agency itself did not comply with time limits.
The time lapse between the Director's approval on 15 March 1992, and the decision of the Board which was conveyed to the Appellant on 14 February 1995, by far exceeded the three and a half months' deviation of the Appellant.

21. The Board examined all documents cited before it, including the Appellant's personal file and came out with the following:

(a) The Board noted that the Appellant was referred to two Medical Boards within three months' time. The first declared the Appellant fit for service even though she was sufffering from a degenerative disease in the cervical column.
The Appellant's health condition obviously did not substantially change during this period and yet it merited another referral for a medical board three months later. The Board is of the opinion that the first Medical Board obviously did not take the Appellant's health condition seriously.

(b) Approval for the convening of the second Medical Board came on 15 March 1992. However the Medical Board did not take up the Appellant's case until 17 October 1994, 31 months after the Director's

approval on the pretext that it did not receive confirmation from the Appellant.
After examining the Appellant's personal file, the Board found no evidence in the file that the Appellant had been aware of the contents of the letter of the chairman of the Medical Board dated 30 June 1992. The Board would like to cite its reservations regarding the letter from Area Education Officer dated 17 June 1996 wherein he referred to the said letter and stated that the Appellant was informed in due time i.e. four years ago.
It is to be noted that the Appellant had never requested a Medical Board but was always referred by the Senior Medical Officer due to her bad health condition. The Board is of the opinion that there was negligence in handling the Appellant's case which led to a deteriorating condition of the Appellant's health particularly when one bears in mind that she was suffering from a degenerative disease.

(c) By reference to the second Medical Board's Report that convened on 29 December 1994, the Appellant suffered from asthma, and since 1992 from degenerative disease in the cervical column and multiple sclerosis (...). The Board here would like to question why the Appellant was declared fit at the first Medical Board knowing then that she was suffering from a degenerative disease. Moreover, how is it possible for a person who suffers from 'severe contractions in the vertebras of her neck which prevents her from raising her right hand or using it normally ... ringing in her ears, dizziness and hearing impairment' as described by Senior Medical Officer on 15 April 1992 (...) to be fit as a teacher.

(d) The Board also noted that the signatures on the Report did not follow a chronological order. The Board members signed it on 29 December 1994. The Chief Field Health Programme signed it on 1 May 1995, and Administration signed it 23 January 1995. The Board furthermore noted that it took the Chief Field Health Programme five months to sign this Medical Report.

(e) In this context, the Board is of the opinion that there was extreme negligence in handling the Appellant's health condition. The first Medical Board did not take the Appellant's health condition seriously. The time lapse between the initiation of the second Medical Board and the implementation of the recommendation took thirty one months despite the fact that the Appellant suffered from a degenerative disease.

exchange rate of 11.20 pounds for each dollar and that you be compensated for negligence in handling your health condition.

As there is no contemporaneous record of you having received notification of the requirement that you confirm that you wanted to be examined by a Medical Board in 1992, I have accepted the Board's recommendation regarding the applicable exchange rate and allow your appeal to that extent. However, I have not accepted the Board's conclusions and recommendations regarding compensation. In relation to the Medical Board of December 1991, there is no medical evidence that you were unfit for duty at that time and it is improper for the Joint Appeals Board to substitute its opinion for that of the Medical Board on a purely medical issue. In relation to the failure to examine you in 1992, as you were kept in full time employment as a result of the Agency's failure to convene a Board and continued working without objection, there is no obvious basis upon which you should be granted further monetary compensation for a purely procedural error which, by my acceptance of the Board's primary recommendation, has been rectified. Similarly, the procedural errors concerning your examination in 1994 did not lead to any compensatable consequences.

In accordance with area staff rule 111.3(12), a copy of this letter and the Board's report will be sent to the local Staff Union from SAR thirty days after receipt of this letter by you. Kindly inform the Administration within this period if you object to a copy being sent to the Staff Union."

On 17 April 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant should have been found unfit for duty when the first Medical Board examined her in 1991. The determination declaring the Applicant fit for service amounts to a "professional failure" by the Medical Board, calling for compensation.

2. The Applicant should further be compensated for the Respondent's negligence in having failed to have a new Medical Board convened for 33 months after the Senior Medical Officer determined in January 1992, that the Applicant was unfit for service and recommended that she "be referred [to] a medical board".

Whereas the Respondent's principal contentions are:

1. The Applicant has the sole responsibility for her own health. Therefore, there is no basis upon which the Respondent can be said to have "ignored the Applicant's health condition" or "delayed the termination of her services".

2. There is no evidence that the Applicant was unfit for duty in the period 1991 through December 1994, when it was finally determined that she was unable to continue her job as a teacher by a medical board.

The Tribunal, having deliberated from 2 to 23 July 1999, now pronounces the following judgement:

I. In her appeal before the JAB, the Applicant disputed the exchange rate used by the Respondent in calculating her separation benefits. She also sought compensation for the alleged negligence of the Medical Board. The Respondent accepted the recommendation of the JAB that the Applicant's separation benefits be calculated according to the exchange rate she had requested. The principal issue raised in her application is whether additional compensation should be paid to her, as she claims, "for gross negligence on the part of the Respondent, resulting from ignoring Applicant's health condition, and delaying termination of her services, which affected badly her health status".

II. The first Medical Board had found in October 1991 that the Applicant was fit for service. Then, in January 1992, the Senior Medical Officer reported that the Applicant was unfit for service. In a memorandum dated 30 June 1992, the Chairman of the Medical Board asked the Area Officer, Damascus, to seek confirmation, in writing, from a list of teachers, including the Applicant, as to whether their requests to be examined by a medical board were still valid. The Respondent claims that no confirmation was received from the Applicant, and

that consequently, any delay was the fault of the Applicant. The Applicant claims that she never received any request for such confirmation. The Tribunal notes that it was the Applicant who wanted her service terminated on medical grounds at this point and it is difficult to accept that, if the Applicant had been made aware of the need to confirm in writing her request to be examined by a medical board, she would have failed to do so. There is in addition no evidence of any bad faith on the part of the Applicant. The Tribunal accepts the Applicant's claim that she never received the appropriate communication at issue. Thereafter, it took the Respondent approximately 2 ½ years to convene a medical board to examine the Applicant and decide to release her from service on medical grounds.

III. The Tribunal has held that undue delay in taking an administrative decision is a procedural irregularity which adversely affects the administration of justice (cf. Judgements No. 310, Estabial (1983), No. 353, El-Bolkany (1985), and No. 784, Knowles (1996)). In the present case the Tribunal holds that the delay of more than 2 ½ years in reconvening a medical board constituted a procedural irregularity. Even though the ultimate decision favoured the Applicant, the undue delay in taking that decision violated the Applicant's right to a timely review of her case by a medical board. It is irrelevant whether or not the decision in 1992 would have been in the Applicant's favour. It is the delay in addressing the problem and taking a decision that is being faulted.

IV. The violation of the Applicant's procedural rights is in itself adequate moral injury which warrants compensation (cf. Judgements No. 702, Beg (1995), and No. 774, Stepczynski (1996)). However, in addition to this kind of moral injury, the Applicant underwent the hardship of having to work while in poor health. The Applicant might have been relieved of such hardship, had her problem been addressed in a timely manner. This, too, warrants compensation. On the other hand, the Applicant has no claim for financial loss, since she was paid a salary.

V. The Applicant also claims that the first Medical Board, convened in 1991, erred in its decision finding her fit for service. The Tribunal notes that the findings of a medical board, as an expert advisory body, are subject to a more limited review, since such findings are based on the technical medical knowledge of the Board's members. (Cf. Judgements No. 587, Davidson (1993), and No. 624, Muhtadi (1993)). Furthermore, the decision by the Commissioner-General to accept the recommendation of the Medical Board was an administrative decision of a discretionary nature. The Tribunal can only review such a decision if it is tainted by abuse of discretion, and can only review a medical board's recommendation if there is evidence of improper motive or some substantive or procedural irregularity. Substantive irregularities include errors of law, errors of fact, failure to take account of relevant facts, taking into account irrelevant facts, clearly mistaken conclusions (erreur manifeste d'appréciation) or general arbitrariness. Procedural irregularities include undue delay or lack of due process. (Cf. Judgements No. 814, Monteleone-Gilfillian (1997), No. 815, Calin (1997), No. 847, Wyss (1997), No. 882, Ossolo (1998), and No. 899, Randall (1998)).

VI. In its Judgement No. 210, Reid (1976), paragraph IV, the Tribunal has held that, with regard to the exercise of discretionary powers, it cannot substitute its own judgement for that of the Administration and that it is "competent to review the Respondent's decision if such decision is based on a mistake of facts or is arbitrary or is motivated by prejudice or by other extraneous considerations". (See also Judgement No. 792, Rivola (1996)). In the present case, no evidence has been adduced that the administrative decision or the recommendation of the Medical Board on which it was based suffered from any such defects. The Applicant alleges that the Medical Board did not take its job seriously which, if proved, could constitute a substantive irregularity. The Applicant, however, has not provided any evidence to support such a claim.

VII. For the violation of the Applicant's rights by the procedural irregularity of undue delay and for the hardship and suffering caused the Applicant, as a result of the delay, the Tribunal decides that the Applicant should be compensated with three months' salary.

VIII. For the foregoing reasons, the Tribunal:

(i) Orders that the Applicant be paid three months of her net base salary at the rate in effect on the date of separation; and

(ii) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix Amerasinghe
Member

Victor YENYI OLUNGA
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/918
23 July 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 918

Case No. 998: MERON

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Raya Meron, a former staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 October 1997 and to 31 January 1998, the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 January 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"...

(a) *To rescind* the decision of the Secretary-General rejecting the Applicant's appeals;

(b) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in finding that case No. 320 was not receivable, that case No. 300 was moot and by failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under Staff Regulations and Rules;

(c) *To order* the Respondent to make available to the Appellant her full and complete medical file for examination and reproduction;

(d) *To order* that a Medical Board be convened without further delay to consider all outstanding medical issues and that the ABCC expedite its consideration of all outstanding claims;

(e) *To award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(f) *To award* additional compensation for the unreasonable delays of the Respondent in handling the Applicant's claims and interest on those payments due the Applicant;

(g) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;

(h) *To award* the Applicant as cost, the sum of $10,000.00 in legal fees and $10,000.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 31 December 1998;

Whereas, on 13 January 1999, the Applicant made additional submissions;

Whereas the Applicant filed written observations on 31 May 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 29 April 1991, on a short-term appointment, at the G-4 level, in the Resettlement Section. She received a one-year fixed-term appointment, effective 1 January 1992, as Secretary, Regional Bureau for Asia and

Oceania in Geneva. Her appointment was continuously extended. From 26 April to 31 December 1992, the Applicant served on mission in Cambodia. She retired on 31 July 1997.

On 17 May 1992, while the Applicant was serving on mission in Cambodia, a UN vehicle in which she was a passenger collided with a truck. According to a medical report dated 18 May 1992, the Applicant sustained "head contusion/neck and back contusion". A second medical report dated 27 May 1992, notes under the heading "Diagnostic:", "traumatic inflammation of neck and back muscles".

On 5 September 1992, the Applicant submitted Accident Claim forms to the UNHCR Administration. On 15 December 1992, a physician with UNTAC examined the Applicant and submitted a report to UNHCR, noting that the Applicant suffered "fracture of the front sides C5-C7," that she "cannot turn her head more than 50 degrees to each side due to pain", that "due to excessive medication, Ms. Meron's stomach can no longer support medication," and that "[h]er teeth became very loose." The Applicant continued to submit medical evaluations and bills to the Administration in support of her claim for compensation.

On 25 May 1994, the Advisory Committee on Compensation Claims (ABCC) convened and on 26 May 1994, it recommended that:

> "(i) the [Applicant's] injury (whiplash) be considered as attributable to the performance of official duties on behalf of the United Nations and that therefore all medical expenses, including those dental expenses certified by the Medical Director as reasonable and directly related to the injury may be reimbursed; and
>
> (ii) the claimant be granted special sick leave credit equal to the number of days covering the period from 1 March 1993 until 30 July 1993 under Article 18(a) of Appendix D to the Staff Rules."

The Secretary-General approved this recommendation on 27 May 1994. On 30 June 1994, the Secretary, ABCC, informed the Applicant that, in accordance with the Secretary-General's decision of 27 May 1994, "only the expenses recognized by the Medical Director as

related to your accident of 17 May 1992 can be reimbursed." She further explained, inter alia, that:

> "... your file was reviewed by the Medical Director, who has confirmed that all the expenses previously denied, including your stay at [Loèche-les-Bains] - lodging at the hotel and the travel to the spa - were not reimbursable, since the physical therapy treatments which were approved for reimbursement could have been administered locally without going to a spa. Notwithstanding the liberty of choice of a claimant to obtain treatment wherever he/she chooses, it has been established that stays at spas are not recognized reimbursable under Appendix D to the Staff Rules, except for the actual cost of medical treatment."

On 30 July 1994, the Applicant requested the Secretary-General, under Article 17, Appendix D to the Staff Rules, to review "the decisions taken so far as regards the existence, type and degree of injury and disability attributable to a service-incurred [automobile accident]" and to convene a Medical Board to review the claims that had been rejected by the Medical Director.

On 29 September 1994, the Secretary, ABCC, advised the Officer-in-Charge, Compensation Claims, UN Office in Geneva (UNOG), that the Applicant had not submitted sufficient medical proof to the Medical Director that certain claimed expenses were related to the accident of 17 May 1992, and explained what proof would be required by the Medical Director.

On 14 December 1994, the Applicant wrote to the Secretary-General and the Secretary, ABCC, in response to the 29 September memorandum, detailing her injuries and the treatment for which she submitted claims, requesting access to her medical file, requesting copies of the Joint Medical Service (JMS) reports on which the Medical Director's decisions were based, and asking that the Applicant's submissions be submitted to a Medical Board.

According to the Applicant, on 9 January 1995, she sent a letter to the Secretary, ABCC, enclosing her only copy of a full mouth X-ray, taken on 23 September 1991.

On 20 March 1995, the Secretary, ABCC, informed the Applicant that the Medical Director had advised that the Applicant had not submitted documentation that had been requested of her in the 29 September 1994 letter to the Officer-in-Charge, Compensation Claims, UNOG, which had been copied to her. Specifically, the Applicant had been requested to submit all dental and medical records dating from before her departure to Cambodia.

In a response dated 19 April 1995, the Applicant cited several dental reports made *after* her departure to Cambodia and noted that JMS classified her as being in "1A" physical condition prior to her departure to Cambodia. She further requested that she be given full access to her medical file at JMS.

On 4 May 1995, the Secretary, ABCC, informed the Applicant that the dental X-rays that the Applicant claimed to have sent to her office were never received, and requested the Applicant to send another copy.

On 29 May 1995, the Applicant, accompanied by a member of the Panel of Counsel and a second adviser, examined her full JMS medical file. She arranged to return the next day to photocopy several documents in her file. On 30 May 1995, the Medical Officer notified the Applicant that the Senior Legal Officer, Division of Human Resources Management (DHRM), wished to consult the Office of Legal Affairs, New York, before her request could be granted.

On 31 May 1995, the Applicant requested the Secretary-General to review the administrative decisions not to grant the Applicant full access to her medical file and not to allow her to photocopy the documents from that file. On 14 June 1995, the Senior Legal Adviser, DHRM, informed the Medical Officer, UNHCR, that staff members had no absolute right to obtain access to their medical records simply on demand, since such records are kept by JMS for the purposes of the Organization.

On 8 August 1995, the Applicant lodged an appeal with the Geneva Joint Appeals Board against the decision not to grant her full access to her medical file (the "first appeal").

On 13 October 1995, the Director, DHRM, informed the Assistant-Secretary-General, Office of Human Resources Management, that the Applicant's physician had recently submitted an evaluation that she should be placed on 50 per cent sick leave, and requested that a medical board be convened to review the Applicant's remaining medical claims.

On 14 December 1995, the Secretary, ABCC, informed the Applicant that before a Medical Board could be convened, the Applicant was required to submit the medical information previously requested.

On 5 March 1996, the Applicant requested the Secretary-General to review "the administrative decision by the Medical Director and the Legal Affairs Division to deny me due process by refusing to convene a Medical Board to make recommendations on my medical compensation case to the [ABCC]." By another letter of the same date, the Applicant requested the Secretary-General to review "the administrative decision not to release my UN medical file ... nor refer my case before [the JAB concerning release of the file] ... to the United Nations Administrative Tribunal ..."

On 12 March 1996, the Senior Legal Officer, DHRM, informed the Applicant that she was invited to come look at her medical file kept by JMS, and that therefore, her appeal to the JAB was moot.

On 20 May 1996, the Applicant lodged an appeal with the JAB against the failure to convene a Medical Board (the "second appeal").

On 20 June 1996, the Officer-in-Charge, Compensation Claims, informed the Applicant that the Medical Director had designated a trauma specialist to represent the Organization at the upcoming Medical Board and noted that the Applicant had already designated a physician to represent her before the Medical Board. On 16 September 1996, the Applicant's physician wrote to the Personnel Officer, DHRM, asking when the Medical Board would be convened, and informing her of his conclusion that the Applicant "should be

placed on 100% service-incurred disability since her accident injuries have resulted in permanent health defects."

On 23 July 1996, the Applicant wrote to the Secretary, JAB, alleging that documents were missing from her JMS file and that one document in particular had been "doctored". She requested that the missing documents be produced and that the JAB consider her appeal without further delay.

On 14 March 1997, the JAB adopted its report on the first appeal. The merits of the case and its conclusion and recommendation read as follows:

"**Merits of the case**

49. In her initial request for review, the Appellant sought the release of her medical file. In that respect, the Panel noted that the Appellant consulted her entire medical file on 29 May 1995, and was given a copy of her entire medical file on 26 May 1996. The appeal could have become moot at that stage, but in her comments dated 26 September 1996, the Appellant argued that seven documents were missing from her medical file. The Panel considered the Appellant's complaint regarding these seven documents allegedly missing from her medical file and noted that two of these documents were medical information while the others could be qualified as administrative communications, which were not by nature supposed to be inserted in a medical file. By a memorandum dated 12 February 1997, the Panel requested information from the Respondent, in order to establish if the Appellant had consulted those documents without being authorized to copy them or if the staff member had been precluded from consulting them.

50. Concerning the medical information and in the first place the medical report from Phnom Penh allegedly dated 20 October 1992, the Medical Officer, UNHCR, informed the Panel in a memorandum dated 24 February 1997, that in his hand-written report of 15 October 1993 he was in fact referring to the medical examination of 23 October 1992, whose findings were described in the medical report of 15 December 1992. The Medical Officer, UNHCR, had misquoted the date of said report. Consequently, the Panel noted that there existed no medical report dated 20 October 1992 and that therefore no such report could be considered missing from the medical file. Furthermore, the Panel noted that the relevant medical report dated 15 December 1992 was well known to the Appellant, who provided several copies of it in her JAB file. Regarding the original carbon copy of Dr. Celton's reporting letter to Dr. Laux of November 1993, the Medical Officer informed the Panel that such

carbon documents are very flimsy and often have to be replaced by sturdier copies as was done in the Appellant's file. The Medical Officer testified in his memorandum of 24 February 1997 that the copy consulted by the Appellant was the exact reproduction of the original document.

51. The Panel then examined the Appellant's contention in respect of the other allegedly missing documents. ... In both cases it appears that the Appellant had copies of said documents as she provided them in her statement of appeal.

52. Concerning the letter from the Chief, 'Litigation Unit,' to the JMS dated 17 September 1995, the Medical Officer, UNHCR, explained in his memorandum of 24 February 1997 that in his reply to the Chief, 'Litigation Unit,' on 17 October 1995 he had misquoted the date of the memorandum and referred to 17 September instead of 18 September 1995. The Medical Officer, UNHCR, provided the Panel with a copy of the memorandum of 18 September 1995 which was, however, already included in the JAB file.

53. The Appellant also referred to a memorandum supposedly sent by the Director, JMS to the UNHCR Mediator in reply to the latter's letter of 1 August 1994. It appears that the Director, JMS, never replied in writing to the Mediator's letter. In this respect, the Medical Officer, UNHCR, underlined in his memorandum of 24 February 1997 that the Appellant was provided with a copy of her entire medical file on 14 May 1996 and this before her two witnesses.

54. As requested by the Panel, the Respondent sent a copy of a memorandum of 31 May 1995 from [the Principal Legal Officer, General Legal Division, Office of Legal Affairs] presenting UN guidelines applicable to the consultation of medical files. The Panel noted that medical reports are maintained by the Medical Service in the interest of the Organization and therefore the staff members have no absolute right for the staff member [sic] to consult these files. Nevertheless, in some specific cases the Administration may allow the staff member's physician or attorney as well as internal review panels, to consult this confidential file. In the present case, the Panel noted that the UNHCR Administration authorized the Appellant to consult her medical file in person. Furthermore, she consulted this file before a witness who was not a UN staff member. In this respect, the Panel wishes to recall that according to the opinion of the Principal Legal Officer, General Legal Division, OLA, no UN staff member can consult the medical file of another staff member even if the latter has authorized him/her to do so. Moreover, Appellant was given [a] copy of her entire medical file, which constitutes another serious departure from established legal doctrine. The Panel believes that had the Administration followed established practice regarding consultation of medical files, the present appeal could have been

avoided. In this view, the Panel concluded that Appellant had full access to her medical file and that the Administration's wilful intent to delay or withhold the release of her medical file was not established.

...

Conclusion and recommendation

56. The Panel concluded that the Appellant was given access to her entire medical file and received copy thereof.

57. In the light of the above, the Panel makes no recommendation in support of this appeal."

Also on 14 March 1997, the JAB adopted its report on the second appeal. Its consideration, conclusion, recommendation, and special remark read as follows:

"**Consideration of the case**

38. The Panel first examined the receivability *ratione materiae* of the appeal. Indeed, the Appellant had not identified the contested administrative decision. In the light of the elements provided by the file, the Panel came to the conclusion that the staff member was requesting the review of the contents of the memorandum dated 14 December 1995 from the Secretary of the ABCC to the Officer-in-Charge of Compensation Claims, Geneva. The Panel found that the 'contested decision,' which was communicated to the Appellant on 3 January 1996, did not constitute a refusal to convene a Medical Board on her case for compensation but only subjected the convening of the Board to the production by the Appellant of some specific medical documents. Moreover, the panel noted that a meeting of the Medical Board was scheduled on 23 January 1997 but had to be postponed due to the unavailability of the Appellant's representing physician. Hence, as the contested decision could not be interpreted as a unilateral act emanating from the Administration and having a bearing on the staff member's conditions of employment, the Panel concluded that the appeal was not receivable.

Conclusion and recommendation

39. The Panel concluded that the appeal was not receivable.

40. In the light of the above, the Panel makes no recommendation in support of this appeal.

Special remark

41. In view of the complexity of this case, the Panel believes it would be useful to make some remarks in connection with certain issues raised in this case.

42. In the interest of due process it is essential that both parties, and especially the Respondent, respect the time-limits prescribed by the Staff Rules. In this particular case the Panel noted that the Administration failed to submit its reply in time. Pursuant to staff rule 111.2 (g) 'the designated representative of the Secretary-General shall submit a written reply within two months following the date of receipt of the appeal'. Nevertheless, the Respondent may request an extension of the time-limit under article 20 of the Rules of Procedure and Guidelines of the Geneva JAB. In the present case, the Panel noted with concern that although the Respondent received several reminders, the Administration's reply which was due by 23 July 1996, was only received under cover of a memorandum dated 3 September 1996.

43. As the issue raised in this case hinges on a medical question, the Panel considers that at this stage it would be in the interest both of the Organization and the Appellant to convene a Medical Board with the utmost expediency to allow the examination of the staff member's claim for compensation."

On 18 April 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report in the first appeal and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's concern that in giving you personal access to your medical file and providing you with a copy of your entire file, the Administration departed from established practice and legal doctrine. He has also taken note of the Board's unanimous conclusion that you had full access to your medical file and received [a] copy thereof and that the Administration's wilful intent to delay or withhold the release of your medical file was not established. Finally, the

Secretary-General has noted the Board's determination to make no recommendation in support of your appeal, and accordingly, has decided to take no further action in your case."

Also on 18 April 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report in the second appeal and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's statement that you had not identified the contested administrative decision and of the Board's conclusion that the document you were contesting did not constitute a refusal to convene a Medical Board but only subjected the convening of such Board to the production by you of some specific medical documents. The Secretary-General also took note of the Board's unanimous conclusion that the appeal was not receivable and of the Board's determination to make no recommendation in support of your appeal. The Secretary-General has decided to accept this recommendation.

Moreover, the Secretary-General agrees with the Special Remark of the Board, which, inter alia, states that at this stage it would be in the interest both of the Organization and your interest to convene a Medical Board with the utmost expediency to allow the examination of your claim for compensation. The Secretary-General is thus requesting all concerned to cooperate to this end so that a Board can be convened within six weeks from the date of this letter." (Emphasis in original.)

On 23 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent improperly withheld important medical evidence from the Applicant.

2. The Respondent denied the Applicant due process by failing to convene a Medical Board for over five years after the Applicant's service-incurred injury.

3. The Respondent's delays were prejudicial to her case and caused her material and moral damage.

Whereas the Respondent's principal contentions are:

1. Applicant's rights were not prejudiced in any way with respect to her access to the Organization's medical file concerning her, since she was provided a complete copy of the entire medical file.

2. Applicant's request to convene a medical board to consider her claims for compensation was honored after all relevant medical information was gathered.

The Tribunal, having deliberated from 6 to 23 July 1999, now pronounces the following judgement:

I. The Applicant's pleas raise two principal questions:

(i) Was the Applicant improperly denied access to her medical file?

(ii) Was there undue delay by the Respondent in convening a Medical Board?

II. With regard to the first question raised above, the Tribunal has previously considered the rights of staff to have access to their medical files in the possession of the UN Joint Medical Service. In this regard, the Tribunal recalls its Judgement No. 872, Hjelmqvist, paragraph XVI (1998), in which it stated that "[t]he Tribunal fails to understand the rationale for preventing staff from access to their own medical files [and] ... recommends that this policy be reconsidered and reversed." The Tribunal is of the view that persons who seek access to medical files should be treated with efficiency and compassion, as delays in accommodating them will only serve to compound or magnify their grievances.

III. In the present case, the Applicant requested access to her medical file on 14 December 1994 and again on 19 April 1995, and reviewed the file on 29 May 1995. However, when she sought to return the next day (30 May) to make copies of certain documents in that file, she was told that she could not do so until the Office of Legal Affairs had been consulted. This exercise caused the Applicant a delay of almost one year. The legal advice given, which caused this delay, dealt with the general issue of access to files and never addressed the particular circumstances of the Applicant. She was, however, eventually given further access to her medical file on 14 May 1996 and allowed to copy it. Therefore, by the time she appealed to the JAB on 20 May 1996, the issue of whether she was entitled to see her medical file had become moot, because she had received full satisfaction from the Administration prior to filing her appeal. Although the Applicant claims that certain documents were missing from her medical file, the Tribunal is satisfied that the JAB thoroughly examined this issue and properly rejected the allegation. Further, while the Tribunal notes that the Applicant suffered frustration and annoyance by reason of the delay caused by the Respondent, it is not satisfied that the delay was so serious or that the consequences thereof caused such harm as would entitle the Applicant to an award of compensation.

IV. With regard to the second question, the Applicant claims that there was undue delay in convening a Medical Board, causing her injury, for which she should be compensated. The Tribunal notes that the Applicant first requested that her claim be submitted to a Medical Board on 14 December 1994. After numerous exchanges of correspondence and requests by the Administration for more information from the Applicant, a Medical Board was convened in early 1997. Another Medical Board was subsequently convened in 1998. At that time, the Applicant received some reimbursement from the Administration on her claims.

V. The Tribunal notes that there is a disagreement between the Applicant and the Respondent concerning the Administration's efficiency in keeping and filing documents submitted by the Applicant. While this issue cannot be resolved by the Tribunal, it is nonetheless satisfied that the Applicant herself contributed to the delay in having her claims put before a Medical Board because she did not submit certain medical records dating from before the accident, when requested by the Medical Director to do so. Such records were necessary to determine whether there was a causal connection between the accident and her alleged injuries. In addition, the Tribunal finds that the delay caused the Applicant no serious damage and notes that a Medical Board was eventually convened to review her outstanding claims. In these circumstances, the Tribunal holds that the delay does not warrant monetary compensation. Such compensation would only be warranted if the delay were so serious that it constituted a failure to provide due process, which is not the case here. (Cf. Judgement No. 541, Ibarria (1991)).

VI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary